Supreme Court, U.S.
FILED

No. 011443 MAR 28 2002

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In The

Supreme Court of the United States

FLOYD WEATHERSPOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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Question Presented For Review

Whether the Fourth Circuits' upholding of the district court's application of the obstruction of justice enhancement in U.S. Sentencing Guidelines Manual Section 3C1.1 (1998) violates this courts' holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)?

Parties To The Proceeding

United States, *Respondent*
Steven Hale Levin, AUSA
Post Office Box 1858
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v.

Floyd Weatherspoon, *Appellant*
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Opinion Below

The Opinion of the United States Court of Appeals for the Fourth Circuit was not published, but is reproduced at Appendix page A-1.

United States v. Weatherspoon,
99-4689 (4th Cir. June 6, 2000), *rev'd rem'd,*
99-4689 (4th Cir. December 28, 2001)

Jurisdiction Statement

On December 28, 2001, the United States Court of Appeals for the Fourth Circuit entered the judgment in this case. Pursuant to 28 U.S.C. Section 1254 this Court has jurisdiction to review on writ of certiorari the judgment in question.

Constitutional Provisions, Treaties, Statutes, Ordinances And Regulations

U.S. Sentencing Guidelines Manual Sections 3C1.1(1998)

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) closely related offense, increase the offense level by 2 levels.

Statement Of The Case

The facts in the case show that during the trial, the Appellant called a government witness. The witness subsequently testified that the Appellant asked her whether she had spoken to the officers investigating the case and

what she told them. The witness told the Appellant that she told the truth. She further stated that the Appellant wanted her to say he wasn't in and out of town more than two or three times, and that he never cooked any crack. She said the Appellant hung up the phone before she had a chance to respond. The Government used this conversation as the basis for seeking an enhancement of the Appellant's sentence.

Jurisdiction arose in the District Court as the Appellant was charged with violations of Title 21, United States Code, Section 841 and 846. The Judgment and Commitment Order was entered on August 31, 1999. On September 8, 1999, the Appellant filed a timely notice of appeal. The Fourth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291.

The case was submitted on November 29, 2001 on remand from the United States Supreme Court (S.Ct. No. 00-6433) for further consideration in light of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Argument

That this petition for a writ of certiorari should be granted because the decision entered by the United States of Appeals for the Fourth Circuit conflicts with a relevant decision of this Court. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), Justice Scalia in his concurrence reiterates his prior position in this area, that enhancements are elements that must go to the jury. His concurrence emphasizes the constitutional role of the jury and the key role it plays as a bulwark against the might of the state. Juries, rather than judges are better situated to decide, weigh and evaluate the sentencing factors.

Moreover, In *Apprendi*, Justice Thomas explained his reasons for a broader reading of the Constitutional rights recognized by the majority in the case:

> What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment - for establishing or increasing the prosecution's entitlement - it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the questions from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statutue.

The petitioner contends that the United States Constitution mandates that any facts which increase's a defendant's punishment must be proved beyond a reasonable doubt at trial. In the instant case the petitioners' sentence, pursuant to U.S. Sentencing Guidelines Manual Section 3C1.1 (1998), was increased by two levels for obstruction of justice. Based on the relevant testimony it was clear there was no attempt by the petitioner to obstruct justice, especially to a level that would justify an enhancement of his sentence. The testimony merely shows that the petitioner called a government witness inquiring about her conversation with a police officer. The statements made by the petitioner related to the truthfulness of the witnesses' statement to the police offer and not to suborning perjury.

Indeed the petitioner exercised poor judgment by contacting the witness. Furthermore, if the petitioner wished for the witness to commit perjury, it doesn't make sense why he would want to hang up the phone before she could respond to his questions. Based on this conduct, the petitioner should not have received an enhancement. The state would not have been able to establish beyond a reasonable doubt that he obstructed justice and a jury of his

peers would have found that his conduct did not justify an increase in the punishment he received.

Respectfully submitted this the 28th day of March 2002.

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United States v. Weatherspoon,
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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4689

FLOYD WEATHERSPOON,
Defendant-Appellant.

On Remand from the United States Supreme Court.
(S. Ct. No. 00-6433)

Submitted: November 29, 2001

Decided: December 28, 2001

Entered December 28, 2001

Before WILLIAMS, MICHAEL, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Walter Thaniel Johnson, Jr., Juanita Boger Allen, Greensboro, North Carolina, for Appellant. Walter C. Holton, Jr., United States Attorney, Steven H. Levin, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This case is on remand from the United States Supreme Court for further consideration in light of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). The Court decided Apprendi after a jury convicted Floyd Weatherspoon of conspiracy to distribute more than fifty grams of crack cocaine and to possess quantities of cocaine with the intent to manufacture crack, in violation of 21 U.S.C. § 846 (1994); possession with intent to distribute more than fifty grams of crack, in violation of 21 U.S.C.A. § 841 (West 1999 & Supp. 2001); and possession of more than 500 grams of cocaine with the intent to manufacture crack, in violation of § 841. The district court sentenced Weatherspoon to three concurrent 328-month terms of incarceration, and we affirmed his convictions and sentences. United States v. Weatherspoon, No. 99-4689, 2001 WL 731917 (4th Cir. June 6, 2000)(unpublished), vacated, 531 U.S. 1135 (2001). We grant Weatherspoon's motion to file a pro se supplemental brief on remand, and, after reviewing his convictions and sentences for plain error in light of Apprendi, we affirm[1]. See United States v. Promise, 255 F.3d 150, 154 (4th Cir.

[1]Because Apprendi does not affect the reasoning in our prior opinion in this case, we adhere to that decision.

2001) (en banc) (discussing plain error standard of review), petition for cert. filed, Sept. 20, 2001 (No. 01-6398).

In Promise, we applied Apprendi to drug offenses in §§ 841 and 846 and held that "the specific threshold [drug] quantity must be treated as an element of an aggravated drug trafficking offense, i.e., charged in the indictment and proved to the jury beyond a reasonable doubt." Id. at 156-57 (footnotes omitted). Here, drug quantity was charged in the indictment and submitted to the jury. We therefore find no error under Apprendi. United States v. Richardson, 233 F.3d 223, 230-31 (4th Cir. 2000) (holding that no Apprendi error occurred when indictment charged drug quantity and jury was instructed that government had to prove offenses as charged in indictment), petition for cert. filed, Mar. 19, 2001 (No. 00-9234). Nor do we find plain error in the district court's application of the obstruction of justice enhancement in U.S. Sentencing Guidelines Manual § 3C1.1 (1998), which Weatherspoon alleges violates Apprendi. United States v. Kinter, 235 F.3d 192, 200-01 (4th Cir. 2000) (holding that Apprendi does not apply to judge's exercise of sentencing discretion within statutory range, so long as defendant's sentence is not set beyond maximum term specified in substantive statute), cert. denied, 121 S. Ct. 1393 (2001).

Weatherspoon also raises several other claims in his pro se supplemental brief on remand, none of which has merit. Although Weatherspoon contends that, after Apprendi, § 841 is unconstitutional, we recently rejected that claim. United States v. McAllister, ___ F.3d ___, 2001 WL 1387341, at *2 (4th Cir. Nov. 8, 2001). Contrary to Weatherspoon's contention that the indictment was constructively amended, his claims are belied by the record. Finally, with regard to his claim that the district court erred in failing to require the jury to find the object or objects of the conspiracy,[2] we find that his claim is foreclosed by the

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[2]See United States v. Rhynes, 196 F.3d 207 (4th Cir. 1999), vacated in part on other grounds, 218 F.3d 310 (4th Cir.) (en banc), and cert. denied, 530 U.S. 1222 (2000).

mandate rule. See United States v. Bell, 5 F.3d 64, 66-67 (4th Cir. 1993). Even if this claim were not foreclosed by the mandate rule, it is meritless because the jury found Weatherspoon guilty of possession with intent to distribute more than fifty grams of cocaine base and possession of more than 500 grams of cocaine with intent to manufacture cocaine base. It is thus clear that the jury found that both cocaine base and cocaine were objectives of the conspiracy.

Accordingly, we affirm Weatherspoon's convictions and concurrent 328-month sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED